No. 80-758

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE S.S. ZOE COLOCOTRONI, MARBONANZA COMPAÑIA NAVIERA, S.A., COLOCOTRONI LTD., COLOCOTRONI BROTHERS, S.A., THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG) and THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LONDON) LIMITED,

Petitioners,

-against-

THE COMMONWEALTH OF PUERTO RICO and THE ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

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Revision of the Questions Presented

Since it is clear that the federal constitutional guarantees of due process of law and equal protection of the laws are extended to Puerto Rico by the Due Process Clause of the

Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment,[1] questions one and three have been revised accordingly, as set forth below:

> 1. Whether, consistently with the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution, a Puerto Rico federal court may exercise in personam jurisdiction over a foreign marine protection and indemnity insurance company in an admiralty action, if the insurer's only contacts with the forum were its retainer of a Puerto Rico law firm and the fact that ships covered under its policies of indemnity insurance occasionally have been present in the territorial waters of Puerto Rico?
>
> * * *
>
> 3. Whether, consistently with the Due Process Clause of the Fifth Amendment to the Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, a foreign insurance company may be held to a more stringent standard for a determination of whether it is amenable to the personal jurisdiction of the Puerto Rico federal court in an admiralty action, than other non-resident corporations?

These technical revisions do not change the questions substantively. *See Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero,* 426 U.S. 572, 600-601 (1976); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 668 n.5 (1974); *Stagg, Mather & Hough* v. *Descartes,* 244 F.2d 578, 583 (1st Cir. 1957).

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1. The courts have deemed it unnecessary to determine whether the federal guarantees of due process and equal protection are extended to Puerto Rico by the Fifth Amendment or the Fourteenth Amendment. *E.g.,* Examining Board of Engineers, Architects and Surveyors *v.* Flores de Otero, 426 U.S. 572, 600-601 (1976).

ARGUMENT

I.

PLAINTIFFS' REFERENCES TO PREJUDICIAL MATTER SHOULD BE DISREGARDED.

Since defendants' answers were stricken and judgment entered against them on the question of liability as a sanction under Rule 37(b)(2)(c), Fed.R.Civ.P., defendants were not permitted to offer evidence on the cause of the grounding of the ZOE COLOCOTRONI or her condition at the time of the accident. Nevertheless, nine pages of Judge Torruella's decision were devoted to the circumstances of the accident, which was not litigated. (58a-67a). In support of this irrelevant narrative, the trial judge had relied on the self-serving depositons of the ZOE COLOCOTRONI's master and other crew members, none of which were in evidence. The court of appeals agreed with defendants that the district court's findings on liability were redundant, but ruled that the trial court's attitude had not been "poisoned" against defendants by the crew depositions on the other questions at issue. (23a-24a).

Notwithtanding, plaintiffs have again recited the crew members' unsubstantiated version of the grounding in both their brief in opposition to the petition for certiorari (p. 2) and in their cross-petition for certiorari, No. 80-979 (pp. 3-4, 11). These allegations are without basis in the record and irrelevant and should be disregarded by the Court.

II.

PLAINTIFFS' ARGUMENT THAT THE HARTZELL LAW FIRM PERFORMED SERVICES FOR WEST OF ENGLAND OTHER THAN IN A LEGAL CAPACITY WAS PROPERLY REJECTED BY THE DISTRICT COURT AND THE COURT OF APPEALS.

The main thrust of plaintiffs' argument in opposition to the writ of certiorari on the question of long-arm jurisdiction over West of England is that the Hartzell law firm served as a general agent of West of England, not merely as attorney for its client. These same contentions were raised below, but were rejected by the district court and the court of appeals. (25a, 114a-115a). Personal jurisdiction over West of England was predicated on alleged relations with the forum much more tenuous than the claimed employment of an agent.

The files of the Hartzell law firm relating to West of England and its insureds show that Hartzell rendered services only in cases of actual or potential legal claims. (SA272-SA623; see Reply Brief for the Appellants, filed February 14, 1980 with the Court of Appeals for the First Circuit, Nos. 78-1543 & 79-1468, at 25-27). Moreover, in most of these cases, it is clear from the documents in the record that the Hartzell firm served as attorneys for insured shipowners rather than for West of England.[2] *Id.*

2. Although the court of appeals declined to hold that the services performed by Hartzell for West of England were outside the scope of the attorney-client relationship, it nevertheless relied upon that relationship to support its finding that West of England could have foreseen that it would be sued in Puerto Rico. (25a-30a). Such use of the attorney-client relationship as a jurisdictional "contact" is unprecedented and should be reviewed by this Court.

III.

IT WAS NOT WITHIN THE POWER OF THE COURT BELOW TO CREATE A DAMAGE REMEDY AT VARIANCE WITH THE COMMON LAW AND WHICH THE LEGISLATURE HAD FAILED TO ENACT.

A. The Diminution Rule Governs Actions at Admiralty.

Plaintiffs display a penchant for the phrase *restitutio in integrum,* "one of those scraps of Latin which serve only to bemuse the user and usually the hearer." *Zeller Marine Corp.* v. *Nessa Corp.,* 166 F.2d 32, 35 (2d Cir. 1948) (Learned Hand, J., dissenting). They contend that pursuant to the principle of *restitutio in integrum,* the owner of a ship damaged in a collision has an unconditional right to restoration of his vessel to its condition immediately before the collision. (Respondents' Brief at 28). Since the instant case was brought within the admiralty jurisdiction of the district court, plaintiffs argue that the rule of *restitutio in integrum* is controlling, and that they therefore are entitled to have their property restored to its condition prior to the oil spill, regardless of the cost.

Actually, the measure of damages traditionally applicable in collision cases is the diminution in the ship's value resulting from the accident. However, "the cost of necessary repairs and demurrage, profits lost while repairs are being made, have long been accepted as its equivalent." *Demetrius Maritime Co.* v. *S/T "CONNECTICUT",* 463 F. Supp. 1108, 1109 (S.D.N.Y. 1979) (Lumbard, J.). *Accord, Pinto* v. *M/S "Fernwood",* 507 F.2d 1327, 1331 (1st. Cir. 1974).

Moreover, the law is clear that collision damages may not exceed the fair market value of the damaged ship:

> "When a vessel is so much damaged by a collision that a prudent uninsured owner would not repair

> her, such vessel must then be considered as a constructive total loss, and her owner is entitled to claim from the wrongdoer the value of the ship as if she had been actually and totally lost. . . . This rule is based on the principle of *restitutio in integrum* . . ., because the loss of the value of a ship is the maximum loss which can result from a collision. It is also supported by the principle that the injured party must minimize his loss so far as is reasonably possible. To take a simple example, if a ship which is only worth at the time of collision £5,000 is so much injured that the cost of repairs will be £6,000, it would be obviously unjust to demand from the wrongdoer as damages a sum greater than that which would give the owner of the injured vessel the actual value of his ship at the moment of collision. Hence, adopting a convenient phrase of insurance law, the injured vessel has, under such circumstances, become a constructive total loss, and her owner is to be indemnified, not by the payment to him of the cost of repair, but of the value of his vessel." F. ROSCOE, THE MEASURE OF DAMAGES IN ACTIONS OF MARITIME COLLISIONS 51 (3d ed. 1929) (footnote omitted.)

Thus, in *O'Brien Brothers, Inc.* v. *The Helen B. Moran,* 160 F.2d 502, 506 (2d Cir. 1947), the court of appeals held that "the cost of repairs and demurrage can only be allowed if such cost of repairs did not exceed the value of the barge at the time of the collision."

It is obvious that in an appropriate case, a federal court sitting in admiralty should apply the same rule for measuring damages that has been well established at common law and included in the RESTATEMENT (SECOND) OF TORTS—the "diminution rule". One such case, where the cost of repairs was demonstrably greater than the diminution in value, was *The Nyland,* 164 F. Supp. 741 (D. Md.

1958), involving collision damage to an overaged Liberty Ship, the "E. KIRBY SMITH." The district court found that the fair market value of the SMITH before the collision was $351,500, and that repairs would have cost $269,121. 164 F. Supp. at 743. However, the government did not repair the ship, but sold her for scrap for $147,-777.77. *Id.* Accordingly, the court awarded damages of $203,722.23, the difference between the SMITH'S value before the collision and her value as scrap after the collision, since this sum was less than the cost of repairing the vessel. 164 F. Supp. at 745.

B. The Theory of Damages Propounded by the Court of Appeals is Without Support in the Law and Would Permit Plaintiffs to Reap an Unconscionable Windfall.

The court of appeals' decision leaves open the possibility that the Commonwealth may recover environmental damages in further proceedings before the district court. If this should occur, plaintiffs would be better off than they were before the oil spill by the amount of damages awarded, since they would be able to sell the impacted property for at least as much as it would have brought prior to the oil spill. Thus the rule for measuring environmental damages propounded by the court of appeals would permit a double recovery and clearly is contrary to the great body of common law of damages.

Neither plaintiffs nor the court below have cited any legislative history in support of the court's ruling that the statute permitting recovery of the "total value of the damages caused to the environment and/or natural resources"[3] repeals the common law of damage evaluation. Nor do the cases support this decision. Indeed, plaintiffs have conceded that this case is governed by the principles of admi-

3. 12 L.P.R.A. § 1131 (29) (1978).

ralty law, which, as noted previously, incorporate the well-established "diminution rule."

Plaintiffs have argued that their recovery should not be limited by the diminution rule to the pecuniary value of their loss on grounds that the mangrove lands which were polluted by oil are not marketable. (Respondents' Brief at 30). However, *the laws of Puerto Rico specifically provide for draining and selling the Commonwealth's mangrove swamp lands.* Puerto Rico Swampy or Barren Land Reclamation Act, 28 L.P.R.A. §§ 71-86 (1966).[4] Pursuant to Section 84 of this statute,

> "The Secretary of Public Works is hereby authorized to proceed to drain mangrove swamp lands belonging to natural persons or to bodies politic, for an adequate consideration in money or in mangrove swamp lands. *He is likewise authorized to drain the mangrove swamp lands belonging to the Commonwealth of Puerto Rico and to sell and lease thm after they have been drained,* subject to such limitations mentioned in section 80 of this title as may be applicable." 28 L.P.R.A. § 84 (emphasis added).

The following conditions of sale are applicable:

> "Provided, That the drained lands belonging to the Commonwealth of Puerto Rico shall be devoted to the creation of workmen's settlements or agricultural farms . . . ; Provided, further, That *the Secretary of Public Works is hereby empowered to sell mangrove swamp lands* to the municipalities and to charitable

4. The Act's statement of motives provides:
"The existence in Puerto Rico of approximately 16,000 *cuerdas* of waste lands, swamps, marshes or poorly drained lands which can be improved and changed into fertile highly productive lands is not . . . justified. Such lands are furthermore, sources of infection, or breeding places for the mosquito which transmits malaria, and must be eliminated. . . ." 28 L.P.R.A. at p. 209.

> or educational institutions to be devoted to the construction of buildings for said purposes, *for a nominal price* but always with the condition that said mangrove swamp lands be drained and the buildings constructed within the time indicated by the Secretary of Public Works." 28 L.P.R.A. § 80 (emphasis added). *See also* 28 L.P.R.A. §§ 79, 82, 86.

Thus, contrary to plaintiffs' contentions, the mangrove lands at Bahia Sucia may be sold by the Commonwealth.

Any natural areas belonging to the Commonwealth, even Commonwealth Forest reserves,[5] may be transferred from the control of the Puerto Rico Department of Natural Resources for development. Puerto Rico Forest Act, § 3(B), 12 L.P.R.A. § 193(B) (1976). For example, the biologically important Aguirre Forest was transferred from the Commonwealth Forest system and developed,[6] and "Puerto Rico's best locality for terns and gulls and one of the island's prime shorebird areas" was "practically eliminated" by the Commonwealth's recent conversion of the San Juan Bay mudflat into a port facility.[7]

When lands are removed from the Commonwealth Forest system for development, the system must be reimbursed "by monetary compensation on the basis of . . . *fair market value.*" Puerto Rico Forest Act, § 3(B), 12 L.P.R.A. § 193 (B) (1976) (emphasis added.) This well-founded standard

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5. The mangrove lands at Bahia Sucia have not been designated as a Commonwealth Forest.

6. See Report of the Committee on Conservation of the American Ornithologists' Union, The Outlook for Wildlife Conservation in Puerto Rico (1975-1976) at 3DD-4DD. This pessimistic report concludes: "Until there is proper management of what the Department of Natural Resources, not to mention the Government of Puerto Rico, already controls, there is little hope for the future of Puerto Rico's wildlife." *Id.*

7. *Id.*

of valuation would properly be applied if the Commonwealth were to transfer West Mangrove to a new owner. *Cf. Gila River Pima-Maricopa Indian Community* v. *United States,* 467 F.2d 1351, 1357 (Ct. Cl. 1972).

C. Modification of the Normal Rule of Damages Is Within the Province of the Legislatures, Not the Courts.

In light of plaintiffs' failure to marshall any support at all for the court of appeals' decision to remand the case for further proceedings on the question of damages, we respectfully submit that the court has improperly assumed the powers of a legislature and adopted a new rule of law which the legislature had failed to enact. The statute pursuant to which this suit was brought simply creates a right of action; it does not specify how damages should be computed. 12 L.P.R.A. § 1131(29). Since the legislature provided no mandate or guidance on the computation of damages, the courts are bound to apply the common law. *See Banks* v. *Chicago Grain Trimmers Association,* 390 U.S. 459, 465 (1968). If the common law was to be changed, it was up to the legislature to do so.[8]

8. Indeed, since the time of the ZOE COLOCOTRONI oil spill, statutory penalties for damaging "any tree or shrub . . . in property of the Commonwealth of Puerto Rico" have been enacted. Puerto Rico Forest Act, §§ 9, 14, 12 L.P.R.A. §§ 199, 204 (1976).

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the petition for a writ of certiorari, defendants respectfully submit that their petition should be granted.

Respectfully submitted,

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